United States Court of Appeals

for the Second Circuit

REPLY BRIEF

77-7158

To be argued by
DONALD F. DRIVER

ORIGINAL

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p/s

In The

United States Court of Appeals

For The Second Circuit

KATHLEEN G. O'GEE,
Plaintiff-Appellee,

-against-

DOBBS HOUSES, INC.,
Defendant and Third Party Plaintiff-Appellant,

-against-

UNITED AIR LINES, INC.,
Third Party Defendant-Appellee and Cross-Appellant.

On Appeal from the United States District Court for the Eastern District of New York.

REPLY BRIEF FOR THIRD PARTY DEFENDANT-APPELLEE AND CROSS-APPELLANT UNITED AIR LINES, INC.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

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KATHLEEN G. O'GEE,

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- against -

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Plaintiff-Appellant,

- against -

UNITED AIR LINES, INC.,

Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF CROSS-APPELLANT, UNITED AIR LINES, INC.

Restatement of Facts Relevant to the Cross-Appeal

The full statement of facts relevant to United Air Lines, Inc.'s (hereinafter referred to as "United") counterclaim against Dobbs Houses, Inc. (hereinafter referred to as "Dobbs") is fully set forth in United's brief on the cross-appeal and this Court is respectfully referred to said brief.

This cross-appeal is timely pursuant to Rule 73(a)(3) of the Federal Rules of Civil Procedure.

POINT I

United's Counterclaim Against Dobbs Should Be Remanded To The District Court to Determine The Sum of Damages Recoverable.

Dobbs contends that United is precluded from proving the damages for the costs, expenses, witness and attorneys' fees to which it is entitled pursuant to the catering agreement entered into between Dobbs and United. United respectfully submits that, pursuant to fact and law, Dobbs' contention is specious, convoluted and totally unwarranted.

The law cited by Dobbs is either totally inapposite to the issue or has been erroneously presented to this Court.

The Davis and United States Line Company cases pertain to maritime law and are totally inapposite.

Dobbs cites Fairchild Camera & Instrument Corporation v. Barletta, 31 App. Div. 2d 534, 295 N.Y.S. 2d 75 (1st Dept., 1968) as New York authority for its claim that United had an obligation to plead and "prove" the damages sought herein at the trial. The Court never stated this proposition. The Court merely stated that [id. 31 App. Div. 2d at 535, 295 N.Y.S.2d at 77]:

> "If the provisions of the agreement authorize a recovery of [counsel fees, etc.] as against the defendants, the right of recovery constitutes a cause of action or an item of damage which should have been pleaded."

Obviously, United did so plead its claim and Dobbs misleads this Court by attempting to insert the square pegged word "prove" into the round hole of the New York Court's decision.

Dobbs then cavilierly claims that Georgia law indicates that

"this type of piece-meal or after thought litigation is not to be condoned" citing Pinkerton & Laws v. Robert & Co., 129 Ga. App. 881, 882, 201 S.E. 2d 654 (Ct. App., Div. 2 1973). Again, Dobbs cites this case out of context. In this Pinkerton case [incidentally, the third round of appeals in that litigation], the court specifically referred to Pinkerton's claim on appeal that the indemnity contract between the parties was contrary to public policy as a contract of adhesion and should not be enforced. The court rebuffed this contention by stating that the relative bargaining position of the parties was known by Pinkerton prior to the two previous appeals and that in one of the previous appeals, Pinkerton had already attempted to attack the indemnity agreement as against public policy on another ground. Pinkerton could have, but did not, press this instant point on "public policy" previously. The Court then quoted from Perry v. McLendon, 62 Ga. 598, 604 stating that a party

> "must discharge all his weapons, and not reserve a part of them for use in a future rencounter [sic]. He must realize that one defeat will not only terminate the campaign, but end the war." [emphasis supplied]

Obviously, this case is of no import to the matter at hand.

It is manifestly clear that, pursuant to Georgia and New York law, proof of damages for attorneys' fees in an indemnification action can be made only after the indemnitee has paid his legal obligation.

Pursuant to Georgia law, an action to establish liability by an indemnitee cannot be maintained until the existence of the indemnitee's liability is determined by some procedure known to law and the amount thereof becomes ascertainable. Southern Nitrogen Co. v. Stevens Shipping Co., 114 Ga. App. 581, 151 S.E.2d 916 (Ct. App.

Div. 3, 1966); Central of Ga. Ry. Co. v. Southern Clays, Inc., 98 Ga. App. 377, 94 S.E.2d 625 (Ct. App., Div. 2, 1956).

The Southern Nitrogen Co. court cited and adopted 42 C.J.S. Indemnity §25, p. 603 which states, in pertinent part, as follows:

> "As a general rule, the right to sue for indemnity for damages . . . accrues only when payment has been legally made by the indemnitee.
>
> "In order that one seeking indemnity be entitled to recover, he must have sustained an actual legal liability . . . [and] the amount claimed must be reasonable and just, and the payment must have been made in good faith."

Squarely on point with the issue herein is the New York case of Colon v. Automatic Retailers Ass'n. Service, Inc., 74 Misc.2d 665, 347 N.Y.S.2d 312 (App. Term, 1st Dept. 1973). The lower court, after trial, granted the indemnitee BOAC money damages for attorneys' fees, etc. pursuant to an indemnity agreement. The judgment was reversed by the appellate court. The appellate court stated that [id., 74 Misc. 2d at 666, 347 N.Y.S.2d at 313]:

> "The award of judgment to BOAC on its cross-claim for indemnification was improper in view of the lack of proof that the obligation for which indemnification was sought had been paid.
>
> "Judgment in favor of BOAC on its cross-claim reversed and dismissed as premature without prejudice . . ."

Thus, as a matter of law, it would have been a frivilous waste of the Court's and counsel's time and energy in the main action below for United to protract the trial by attempting to prove damages for which, after being awarded, would subsequently have been dismissed on appeal.

As a practical matter, it would also have been frivilous for United to present conjectural evidence to the jury at the trial of the

main action as to what United's attorneys' fees might be. The firm representing United is remunerated on an hourly basis and the jury would have to resort to pure guess-work as to how long the trial would last. Certainly, during trial, United could not have produced a "paid" bill. It is significant that in the Colon case, supra., the trial of the main action was before by jury. However, the trial as to the issue of BOAC's damages for attorneys' fees was continued and subsequently determined by the trial judge on the basis of BOAC's attorneys submitting the firm's hourly time sheets as evidence after the main trial concluded. Nonetheless, the appellate court reversed. Furthermore, United also seeks to recover attorneys' fees for the defense and prosecution on Dobbs' appeal and United's cross-appeal, respectively. Again, it is manifestly clear that such evidence as to attorneys' fees on the appeal most certainly could not be proved at trial.

Accordingly, it is respectfully submitted as a matter of law and fact, that the issue of damages in the form of attorneys' fees, etc., to which United is entitled should be remanded to the lower court for trial.

POINT II

The Trial Court Erred In Dismissing United's Counterclaim Against Dobbs.

United's contentions as to how the trial court erred in dismissing United's counterclaim against Dobbs has been presented in United's main brief on its cross-appeal.

Again, Dobbs' counterarguments are specious, obfurscating, convoluted, frivilous and totally without merit.

In this action, a flight attendant employed by United commenced an action against Dobbs to recover damages for injuries she sustained as a result of Dobbs' negligence to properly load and secure a food "buffet" in the aircraft in which she was working. Dobbs was required to provide catering services for United and such services included acquiring, utilizing and inspecting some of United's equipment, and offloading, loading and securing same from and on United's aircraft. United was not joined in the original action as it was plaintiff's employer and, but for this legal technicality, it most probably would have been. Dobbs then impleaded United into the action on the theory that United was negligent in the maintenance and repair of its equipment. United then promptly counterclaimed against Dobbs to recover indemnity as well as attorneys' fees, etc. pursuant to the agreement entered into between them. After an extensive and exhaustive trial, the jury reached a unanimous verdict that plaintiff's injuries were due to the sole negligence of Dobbs in performing its obligations pursuant to the catering agreement.

Dobbs claims that the Georgia authorities set forth in United's brief supports Dobbs' specious contention that this contractual provision is inapplicable to the situation at hand. Again,

Dobbs misinterprets and misconstrues the holdings and facts in these cases.

Georgia Ports Authority v. Central of Georgia Railway Company, 135 Ga. App. 859, 219 S.E.2d 467 (Ct. App., Div. 1, 1975) and Camp Concrete Products v. Central of Georgia Ry. Co., 134 Ga. App. 537, 215 S.E.2d 299 (Ct. App., Div. 1, 1975) are cited by Dobbs as not indicating that counsel fees or other defense expenses were awarded to the indemnitee. The simple fact is that these cases did not concern themselves with the issue of recovery of attorneys' fees. The issue was most likely not litigated as counsel for all the parties involved accepted the law that attorneys' fees were and are recoverable.

Then the case of Pinkerton & Laws Company v. Robert & Company Assoc., 129 Ga. App. 881, 201 S.E.2d 654 (Ct. App., Div. 2, 1973) is proposed by Dobbs as authority that the indemnitee's claim for attorneys' fees was withdrawn on oral argument. A simple reading of this case indicates that the indemnitee's claim for attorney's fees on the ground that Pinkerton was stubbornly litigious was withdrawn - not a claim grounded on the premise that such were recoverable pursuant to the indemnity agreement!

The most egregious and blatant error committed by Dobbs is the citing of Robert & Company Assoc. v. Pinkerton & Laws Co., 120 Ga. App. 29, 169 S.E.2d 360 (Ct. App., Div. 3, 1969) as holding that the indemnitee therein was not awarded attorneys' fees! The converse is true. Indeed, the appeals court noted that the indemnitee was awarded damages in the trial court which included attorneys' fees and further held that [id., 120 Ga. App. at 33, 169 S.E.2d at 364]:

> "We think that under the terms of this contract the actual legal liability of the indemnitor would be those expenses incurred by the indemnitee in defending actions . . ."

Despite all of Dobbs' frivilous arguments, Dobbs appears to concede that it is liable to United for the attorneys' fees sought herein. On page 6 of its brief, Dobbs states:

> "Obviously, the kind of indemnifiable demand or claim embraced by the Indemnity Agreement was for claims against United by third parties, and not claims made against United by Dobbs."

Any proposition or argument that the plaintiff-employee in this litigation is not a "third-party" is totally incredulous! Again, we must reiterate that this plaintiff could not sue United directly due to a legal technicality. Common sense dictates that United and Dobbs were just as desirous as protecting United's employees from injuries due to Dobbs' negligence as they were to members of the general public.

Thus, it cannot be persuasively argued that plaintiff herein was not anything but a "third party" and the case of Georgia Ports Authority v. Central of Georgia Railway Company, 135 Ga. App. 859, 219 S.E.2d 467 (Ct. App., Div. 1, 1975) is dispositive of this litigation.

In the aforesaid case, an employee of the indemnitee Central Railroad of Georgia sued the employer and the Georgia Ports Authority to recover damages for personal injuries he sustained. Unlike the case at bar, that employee could join his employer in an action pursuant to the statutory provision of the Federal Employee's Liability Act. During the course of trial, both defendants settled and a consent verdict was entered. Thereafter, the railroad commenced

an action against the Ports Authority to recover its damages pursuant to an indemnity agreement. The Court found in favor of the railroad and held that [id., 135 Ga. App. at 864, S.E.2d at 473]:

> "It is clear the intent of the parties to save the railroad harmless for . . . loss . . . as well as from third-party [i.e., its employee's] claims arising out of the . . . operations. The only limitation to the authority's liability was where the loss or injury would be as the result of the sole negligence of the railroad with no contributing negligence by the authority.
>
> * * *
>
> "We are satisfied that the railroad company . . . was indemnified against liability to its own employees . . . and especially in this so where its passive negligence concurs with the active negligence of its indemnitee . . ."

Accordingly, since (1) United was found not to be negligent in any manner and (2) that the catering agreement requires Dobbs to indemnify United for all risk of loss unless caused by the gross negligence or willful conduct of United, Dobbs is clearly liable to United for attorneys' fees and other costs herein.

Finally, the issue herein should also be viewed in its practical and economic aspect. Dobbs was aware of the terms of the indemnity agreement and that plaintiff was a United employee. If United was not impleaded into the main action, Dobbs could only be successful if plaintiff were found contributorily negligent. However, if United were brought into the action, Dobbs would then have two grounds for success: (1) plaintiff's contributory negligence or (2) the injuries she sustained were caused by her employer's negligence. Knowing that Dobbs would be liable to United for attorneys' fees, etc. if United were brought into the action, Dobbs did implead United to gain a hopefully better chance to defeat plaintiff's claim against it. Dobbs gambled and lost.

CONCLUSION

DOBBS' APPEAL AS IT PERTAINS TO UNITED SHOULD BE DENIED AND DISMISSED. FURTHER, THE JUDGMENT BELOW AGAINST UNITED ON THE COUNTERCLAIM SHOULD BE REVERSED AND THE DISTRICT COURT DIRECTED TO ENTER JUDGMENT IN FAVOR OF UNITED AGAINST DOBBS WITH THE SOLE ISSUE OF UNITED'S DAMAGES TO BE DETERMINED BY THE DISTRICT COURT ON REMAND.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

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Third Party Defendant-Appellee & Cross Appellant

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street; New York, New York

That on the 24th *day of* August *19*77 *at* 1. 100 Church St; N.Y., N.Y.
2. 801 Second Ave; N.Y., N.Y.

deponent served the annexed

Reply Brief

upon

1. Lipsig Sullivan Mollen & Liapiakis
2. Alexander Asischwartz & Cohen

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 24th
day of August, x *19* 77

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
NO. 31-0183850
Qualified in New York County
Commission Expires March 30, 1979